

# DEFENSE TALK

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A PUBLICATION BY THE LAW FIRM OF

CLIFTON, MUELLER & BOVARNICK, P.C.

AUGUST

ATTORNEYS AT LAW

2010

CURRENT EVENTS, ARTICLES, AND SUMMARIES OF RECENT CASES AND LEGISLATION IN THE AREAS OF WORKERS' COMPENSATION, LIABILITY, INSURANCE, AND EMPLOYMENT LAW

## Industrial Claim Appeals Office Update

The cases summarized here are only a selection of the cases decided by the Industrial Claim Appeals Office. In these summaries, ALJ=administrative law judge; ATP=authorized treating physician; DIME=Division-sponsored independent medical examination or examination; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office.

### DIMES

ICAO affirmed ALJ Jones's order striking respondents' notice and proposal to select a DIME. The ATP sent an impairment rating report to respondent but did not include the range of motion worksheets. Respondent filed its notice and proposal to select a DIME 28 days after it received the worksheets, which was 58 days after it received the impairment rating report. The ALJ found that the ATP's report was a disputed finding or determination that required respondent to file a notice and proposal to select a DIME or an FAL within 30 days. ICAO acknowledged the line of cases

holding that failure to attach the worksheets to an FAL may relieve claimant of the obligation to object to it. However, ICAO held that the absence of the worksheets did not relieve respondent of the obligation to file a notice and proposal to select a DIME or an FAL within 30 days. ICAO noted that respondent could have obtained the worksheets within 30 days or set the matter for hearing if it was unable to obtain them. *Servantes v. Exempla, Inc.*, W.C. No. 4-779-285 (ICAO July 20, 2010)

### Recreational Activities

ICAO affirmed ALJ Harr's order determining that claimant's injury was not compensable. Claimant injured his shoulder participating in an employer-sponsored street hockey tournament. The tournament took place at a resort owned by the employer to which claimant had travelled under his contract for hire to attend business meetings and the annual holiday party. Claimant's participation in the tournament was voluntary. ICAO held that claimant's participation in a voluntary recreational activity was a substantial deviation from his travel status and, therefore, not compensable. *McLachlan v. Center for Spinal Disorders*, W.C. No. 4-789-747 (ICAO July 2, 2010)

### Reasonable & Necessary Medical Treatment

ICAO affirmed ALJ Broniak's order denying claimant's request for certain medical benefits. The ALJ found that claimant had

failed to establish that continued opioid medications, other than those prescribed to wean him from opioids, were reasonable and necessary. Claimant had developed sleep apnea and testosterone deficiencies because of his opioid use, and he continued to complain of pain and lack of functioning despite using opioids. At least three physicians opined that he should be weaned from opioids. ICAO held there was substantial evidence in the record to support the ALJ's determination. *Hall v. Schwan's Sales Enterprises, Inc.*, W.C. No. 4-553-026 (ICAO July 14, 2010)

The orders summarized here are on file with the editor. If you would like a copy of any order, contact Diane Murley at [dmurley@cmb-pc.com](mailto:dmurley@cmb-pc.com) or 970-255-8852.

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## Practice Pointer

## Offers of Modified Employment

By Erica A. Weber

The legislature recently changed the law regarding offers of modified employment. In the recent past, if an employer offered a modified job position that was within a claimant's work restrictions, and the claimant refused to appear for the job, respondents could argue that the claimant was responsible for wage loss and temporary disability benefits would no longer be owed.

Effective July 1, 2010, changes to CRS § 8-42-105(4) limit the effectiveness of an offer of modified employment. Under the law as changed, a refusal to accept an offer of modified employment will not automatically equate to a claimant being responsible for termination.

1) Travel Distance. If the offer requires claimant to travel greater than 50 miles one way more than claimant's pre-injury commute, claimant's refusal of the offer will not constitute responsibility for termination.

2) Reasonableness of Claimant's Rejection

of an Offer. If an ALJ determines the rejection of the offer was reasonable considering the totality of claimant's circumstances, claimant will not be deemed responsible for termination. In determining whether claimant's rejection was reasonable, the ALJ may consider:

A) The consequences of the industrial injury;

B) The financial hardship imposed on claimant in order to accept the modified work; and

C) Any other reasons making it impracticable for claimant to accept the offer.

**What this means to Respondents:** The legislature used extremely broad language in describing considerations an ALJ may consider in determining whether a claimant had a reasonable basis for rejecting an offer of modified employment. When an employee rejects an offer, the employer

should request an explanation from the claimant of the basis for claimant's rejection. A refusal of an offer will be deemed reasonable in certain instances: when the employee is required to travel more than 50 miles more than usual; if a change in the offered work time/shift causes financial hardship (requiring childcare expenses, for example). The greatest topic for upcoming litigation will likely be in defining the "any other reasons" that an offer of modified employment would be "impracticable." For that reason, it is a good idea to obtain the approval of the authorized treating provider for any work offered. An ATP's approval of a job offer may deflect testimony from claimant that the modified work was "impracticable" because it was beyond claimant's physical restrictions.

If you have any questions about offers of modified employment or other techniques for controlling TTD, please contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

## VICTORIES IN THE TRENCHES

### James R. Clifton

In *Carter vs. Nabors Drilling USA*, ALJ Mottram denied and dismissed claimant's claim for permanent total disability benefits. Jim presented surveillance video and testimony of occupational medicine and vocational rehabilitation experts to persuade the ALJ that employment exists that is reasonably available to claimant within his physical abilities. Jim also cross-examined claimant's vocational witness, whom the ALJ found to be less credible than respondents' expert, and built a record that demonstrated numerous inconsistencies between claimant's alleged physical limitations and his actions. The ALJ found that claimant had failed to prove that he is incapable of earning wages in any amount.

In *Gonzales vs. Louisiana Pacific Corporation*, ALJ Mottram denied claimant's motion for summary judgment on the issue of payment for post-MMI prescriptions. Jim persuaded the ALJ that a genuine issue of material fact existed about whether

claimant's medications were being prescribed to treat claimant's compensable neck condition or non-compensable shoulder condition. Jim also argued successfully that claimant had presented insufficient evidence to establish that respondent's actions were unreasonable when it denied payment for the prescriptions after the ATP changed her opinion about the reason for the prescriptions. Therefore, the ALJ denied summary judgment on the issue of penalties.

### Richard A. Bovarnick

In *Granillo vs. Phillip Services Corporation*, ALJ Stuber granted respondents' request to reduce indemnity benefits by 50% due to claimant's safety rule violation. Rich presented contemporaneous written statements by co-employees concerning the safety rule and violation, which the ALJ found were more persuasive than the hearing testimony of claimant and his supervisor. The ALJ also denied and dis-

missed claimant's claim for post-MMI medical benefits.

### John M. Abraham

In *Statley vs. Wal-Mart Stores, Inc.*, ALJ Cannici denied and dismissed claimant's petition to reopen. John presented medical records, employer witnesses, and testimony of a physical medicine and rehabilitation expert to persuade the ALJ that claimant had failed to prove she suffered a change in her physical or mental condition that could be causally connected to her compensable occupational disease.

In *Fuscoe vs. Phillip Services Corporation*, ALJ Friend ordered that claimant should be reimbursed for his average meal expenses based upon the receipts he saved and presented, rather than the standard daily allotment he claimed.

In *West vs. Wal-Mart Stores, Inc.*, PALJ Purdie granted respondents' motion to strike the Division IME panel and Dr.

Please see VICTORIES on page 3

## VICTORIES IN THE TRENCHES

Continued from page 2

Stieg as the DIME physician and ordered the DIME unit to issue a new panel with three new physicians.

### M. Frances McCracken

In *Wingstrom v. Wal-Mart Stores, Inc.*, ICAO affirmed ALJ Cannici's order denying and dismissing claimant's request to reopen her workers' compensation claim. Fran presented medical records and expert testimony to persuade the ALJ that claimant's increased symptoms were the result of an intervening injury, and that claimant had failed to demonstrate that she experienced a worsening of her work-related condition that required medical treatment. ICAO held that the medical records and expert testimony presented by respondents provided substantial evidence to support the ALJ's findings.

In *Brown vs. Wal-Mart Stores, Inc.*, ALJ Walsh denied and dismissed claimant's claim for disfigurement compensation and for an increase in her average weekly wage. Fran persuaded the ALJ that claimant had failed to prove that her small surgical scars were serious, permanent disfigurement to an area of her body normally exposed to public view. Fran also argued successfully that the issue of average

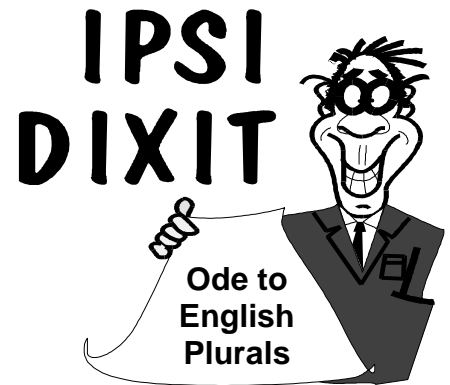
weekly wage was not ripe for hearing, because claimant had failed to endorse PPD benefits as an issue and had withdrawn the issues of TTD, TPD, and PTD.

In *Gallegos vs. Wal-Mart Stores, Inc.*, ALJ Walsh granted respondents' motion to strike claimant's petition to review and ordered claimant not to file any further petitions to review orders entered by pre-hearing administrative law judges (PALJs) unless the order relates to approval of a settlement agreement. Fran argued successfully that the order of the PALJ was interlocutory and not reviewable by the Industrial Claim Appeals Office. Because claimant's attorney had previously filed other petitions to review of interlocutory orders in this case, Fran persuaded the ALJ to preclude claimant from filing further petitions to review interlocutory orders of PALJs.

### Erica A. Weber

In *Middleton vs. Bimbo Bakeries*, ALJ Cannici denied and dismissed claimant's request for permanent total disability benefits. Erica presented the testimony of a vocational expert who concluded that claimant was capable of earning wages within his commutable labor market. Notably, respondents' vocational expert met with claimant in Jacksonville, considered claimant's Florida treatment notes, and conducted an inquiry into job availability within claimant's permanent work restrictions and the Jacksonville labor market. Erica established on cross-examination that claimant's vocational witness had not met with claimant, considered his Florida treatment notes, or inquired into job availability within claimant's work restrictions and commutable labor market.

In *Gutierrez v. Triple A Insurance*, ALJ Stuber denied and dismissed claimant's claim for compensation. The ALJ found the opinions of respondents' experts to be more persuasive than the opinions of claimant's experts. He also noted that the medical literature does not support any relationship between keyboarding and myofascial pain, which often has unknown etiology. Therefore, the ALJ found that claimant had failed to prove by a preponderance of the evidence that she suffered an occupational disease as a direct and proximate result of her work conditions.



*It's enough to drive you crazy!*

We'll begin with a box, and the plural is boxes,  
But the plural of ox becomes oxen, not oxes.  
One fowl is a goose, but two are called geese,  
Yet the plural of moose should never be meese.  
You may find a lone mouse or a nest full of mice,  
Yet the plural of house is houses, not hicc.

If the plural of man is always called men,  
Why shouldn't the plural of pan be properly called pen?  
If I speak of my foot and show you my feet,  
And I give you a boot, would a pair be called beet?  
If one is a tooth and a whole set are teeth,  
Why shouldn't the plural of booth be called beeth?

Then one may be that, and three would be those,  
Yet hat in the plural would never be hose,  
And the plural of cat is cats, not cose.  
We speak of a brother and also of brethren,  
But though we say mother, we never say methren.  
Then the masculine pronouns are he, his and him,  
But imagine the feminine: she, shis and shim!

Send your suggestions for "Ipsi Dixit" to the editor at [dmurley@cmb-pc.com](mailto:dmurley@cmb-pc.com).

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FOUNDED 1991

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